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DIRECTOR

STATE OF IDAHO  
DEPARTMENT OF FINANCE  
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P. O. BOX 83720  
BOISE ID 83720-0031  
Website: <http://finance.state.id.us>

July 19, 2004

[REDACTED]

RE: Request for Opinion

Dear Ms. [REDACTED]:

This is in response to your letter dated July 1, 2004. The purpose of this letter is to clarify the requirements for offering and selling mortgage-related securities under Idaho securities laws.

It is our understanding that [REDACTED] is a Montana corporation licensed as a mortgage broker in Idaho under the Idaho Residential Mortgage Practices Act. According to your letter, a borrower from Ketchum, Idaho applied for a construction loan with [REDACTED] seeking \$1,350,000 to build a spec home in a golf community in Ketchum, ID. [REDACTED] does not have one lender that is willing to make the loan, but is aware of thirteen (13) private lenders that would like to make the loan. The private lenders include individuals, some pension and profit sharing trusts, and some corporate entities. The loan would be originated under one promissory note with one mortgage recorded as security for repayment. The thirteen (13) lenders would hold their mortgage interest as tenants in common as to their respective fractional interest in the loan. There would be no "manager" established for this loan and no gain to the lenders above and beyond the terms of the promissory note.

The Idaho Securities Act ("Act") defines a "security" as:

"any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement,...investment contract...or, in general, any interest or instrument commonly known as a security."

Under this definition, any note or other evidence of indebtedness secured by a deed of trust or mortgage is a security and their offer, sale or issuance is subject to regulation under the Idaho securities laws. The law prohibits the offer or sale of a security unless the security has been registered with the Department or qualifies for an exemption from registration. The law further requires any person who offers or sells a security in this state to be licensed as a securities salesperson or broker-dealer unless an exclusion from such requirement exists.

Banks and Savings Banks (208) 332-8005  
Credit Unions (208) 332-8003  
Securities (208) 332-8004  
Money Transmitters (208) 332-8003

PHONE: (208) 332-8000  
Fax: (208) 332-8098  
Director's Fax: (208) 332-8097  
Securities Fax: (208) 332-8099

Supporting Services (208) 332-8001  
Mortgage Companies (208) 332-8002  
Finance Companies (208) 332-8002  
Collection Agencies (208) 332-8002

EQUAL OPPORTUNITY EMPLOYER

A typical real estate transaction involving a single buyer and a single seller where the purchase is financed by a note secured by a deed of trust or mortgage involves the issuance of a security under the above definition. However, the transaction is exempt from registration by virtue of Section 30-1435(1)(o) of the Act. Section 30-1435(1)(o) exempts:

"any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidence of indebtedness secured thereby, is offered and sold as a unit."

The important condition of this exemption is that the entire note and deed of trust or mortgage must be sold as a unit. The Department has adopted an interpretive rule (see Rule 300.05) that defines "offered and sold as a unit" to mean: "an offer and sale of the entire mortgage, deed of trust, or agreement to a single purchaser at a single sale" (emphasis added).

Under this interpretation, the exemption is clearly not available if there is a "pooling" of interests. Both notes sold "as a unit" and the sale of a partial interest in a note (or the "pooling" of interests to purchase a single note) constitute the offer and sale of a security. The two types of transactions differ in that a note secured by a deed of trust or mortgage may be offered and sold "as a unit" in reliance on the above exemption without filing a registration application with, or receiving written approval from, the Department. Notes that are sold to a "pool" of investors do not qualify for the exemption and may be sold only if they are registered or qualify for a different exemption.

You should also be aware that the exemption discussed above only exempts the transaction or security, but not the person making offers and sales, or otherwise effecting transactions involving mortgage-related securities. Persons engaging in the purchase and sale of mortgage-related securities as part of their regular business, may fall within the statutory definition of securities "broker-dealer". Under the Act, securities "broker-dealer" means: "any person engaged in the business of effecting transactions in securities for the account of others or for his own account..."

Alternatively, persons making the offer and sales of securities may register as agents of the issuer rather than pursue registration as a broker-dealer.

Based on your representations, it appears that the fractionalized loan interests attached to the Ketchum property would constitute a "security" under the Idaho Securities Act and therefore, be subject to the registration or exemption filing requirements of the Act.

Please be aware that the position taken in this letter is based solely on the facts and circumstances presented in the July 1, 2004 letter. Should the facts change or be altered in a material way, our view may be different.

If you have any questions regarding this matter, please contact the undersigned.

Sincerely,

*Nancy C. Ax*  
Nancy C. Ax  
Securities Analyst

(file copy)

[REDACTED]  
[REDACTED]  
RECEIVED

JUL 06 2004

DEPARTMENT OF FINANCE [REDACTED]

July 1, 2004

Idaho Department of Finance  
ATTN: Nancy Ax  
PO Box 83720  
Boise, ID 83720-0031  
Email: [nax@fin.state.id.us](mailto:nax@fin.state.id.us)

RE: Request for Opinion

To Whom It May Concern:

I am general counsel for [REDACTED] a Montana corporation licensed as a mortgage broker in Idaho under the Idaho Residential Mortgage Practices Act as License No. 2684.

A borrower from Ketchum, Idaho, has applied for a construction loan with [REDACTED] for \$1,350,000 to build a spec home in the Valley Club Golf Community of Ketchum, Idaho. [REDACTED] does not have any one lender that is willing to make the loan. However, [REDACTED] does have various private lenders that would like to make the loan. The lenders number approximately thirteen and would originate the loan under one promissory note with one mortgage recorded as security for repayment. The lenders would hold their mortgage interests as tenants in common as to their respective fractional interests in the loan. The lenders consist of individuals, some pension and profit sharing trusts, and some corporate entities (attached is a list identifying the lenders). The loan would close through a title company located in Ketchum, Idaho. There will be no "manager" established for this loan and no gain to the lenders above and beyond the terms of the promissory note. Due to the number of contemplated lenders, it is our concern that this loan may be construed as a "security" under the Idaho Securities Act. See I.C. §30-1402(12).

On behalf of [REDACTED] and its lenders, I therefore request that your department provide an opinion/action letter indicating whether or not this would constitute a security. Please respond as soon as possible. I have been informed that the desired closing date for this transaction would be between July 6<sup>th</sup> and July 9<sup>th</sup>. Thank you.

Cordially yours,  
[REDACTED]  
[REDACTED]

cc: Questa Mortgage

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Phone

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